

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

Case #11-CR-6065-FPG

v.

DECISION & ORDER

SALVATORE J. MARCERA, JR.,
Defendant.

By text order of Hon. David G. Larimer, entered on May 16, 2011, this case was referred to United States Magistrate Judge Marian W. Payson, pursuant to 28 U.S.C. § 636(b)(1)(A)-(B). Dkt. #4. Defendant has been charged with four counts of making and subscribing false income tax returns, in violation of 26 U.S.C. § 7206(1), one count of conspiracy to possess with intent to distribute and to distribute oxycodone, in violation of 21 U.S.C. § 846, and one count of health care fraud, in violation of 18 U.S.C. § 1347.

Defendant filed pretrial motions seeking various relief, including, inter alia: a bill of particulars; discovery and inspection; Brady/Giglio material; early disclosure of Jencks material; in limine rulings; preservation of rough notes; suppression of statements; expert disclosure; severance; a conspiracy hearing; in camera inspection of presentence investigation reports; dismissal of the indictment; and disclosure of grand jury material. Dkt. #12. Oral arguments were heard on these motion requests on September 5, 2012. Dkt. #23. Thereafter, on December 14, 2012, Magistrate Judge Payson filed a Report and Recommendation (Dkt. #27), recommending that this Court deny without prejudice Defendant's motion to suppress statements; deny without prejudice the request for a bill of particulars; deny the motion to dismiss counts one through four and count six of the indictment; grant the motions directing preservation of investigative notes and production of presentence investigation reports for in camera review; grant permission to file

supplemental motions relating to the government's Rule 12(b)(4) notice, with the filing of such motions by January 17, 2013; and deny all other requested motion relief. On January 31, 2013, Defendant filed Objections to the Report and Recommendation, along with various redacted exhibits, objecting specifically to Magistrate Judge Payson's recommended denials of the motion to dismiss counts one through four and count six of the indictment and the request for a bill of particulars. Dkt. #31.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a de novo determination of those portions of the Magistrate Judge's Report and Recommendation to which objections have been made. Upon a de novo review of the Report and Recommendation, and a review of the Objections, the digital recording of the oral arguments made during the motion hearing held on September 5, 2012 and the motion papers, I find no basis to alter, modify or reject the Magistrate Judge's Report and Recommendation.

Regarding Defendant's request for a bill of particulars, the Magistrate Judge determined that a bill of particulars was not warranted in circumstances where the indictment, together with an earlier dismissed 31-page complaint and substantial voluntary discovery relating to the charges in the indictment provided by the government, advised Defendant of the specific acts of which he is accused and the nature of the government's case. Moreover, in light of the government's further provision of records and charts containing information assembled from the underlying records, this Court agrees with the Magistrate Judge that Defendant has "sufficient information to prepare a defense and to avoid unfair surprise at trial, as well as to interpose a claim of double jeopardy, if necessary." Dkt. #27.

This Court agrees with the Magistrate Judge's recommended denial of the motion to dismiss Counts One through Four based upon the finding that such counts were facially sufficient, and Defendant's premature challenge to the sufficiency of the evidence must await the

government's presentation of proof at trial. Regarding these counts, the indictment complied with Fed. R. Crim. P. 7(c)(1), which provides that an indictment "must be a plain, concise, and definite written statement of the essential facts." Moreover, since the language of Count Six of the indictment tracks the language of the statute, accurately setting forth the elements of the offense, and states the approximate time and place of the alleged crime, it is presumptively valid. The proposed findings and the recommendation reflect a reasoned analysis of the facts and application of the relevant law.

Accordingly, the Court accepts and adopts the Report and Recommendation filed by United States Magistrate Judge Marian W. Payson. Dkt. #27. Defendant's motions for a bill of particulars and to dismiss counts one through four and count six of the indictment (Dkt. #12), are hereby denied in all respects.

ALL OF THE ABOVE IS SO ORDERED.

DATED: Rochester, New York
 February 27, 2013



FRANK P. GERACI, JR.
United States District Judge